

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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JUN 3 1991
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Implementation of the Cable Television) MM Docket No. 92-265
Consumer Protection and Competition)
Act of 1992)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

REPLY COMMENTS ON PETITION FOR PARTIAL RECONSIDERATION

GTE Service Corporation, on behalf of its domestic telephone operating companies (GTE), pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), respectfully submits these Reply Comments on the Petition for Partial Consideration filed by the Wireless Cable Association International, Inc. (WCA).

I. Introduction.

As set forth in its Comments, GTE fully supports WCA's Petition and urges the Commission to clarify that multichannel video programming distributors (MVPDs) have standing to file complaints under Section 616 of the Act, 47 U.S.C. § 536. The language of Section 76.1302(a) of the Commission's Rules, 47 C.F.R. § 76.1302(a), adopted specifically to implement Section 616, apparently limits standing only to video programming vendors (VPVs). Such a rule unreasonably fails to afford MVPDs that are victimized by violations of Section 616 standing to file a complaint and therefore

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undermines the effectiveness of Section 616 in protecting programming distributors from the prohibited coercive conduct on the part of cable operators. To the extent that the clarification requested by WCA's Petition requires amendment of Section 76.1302(a) of the Commission's Rules, this section should be so amended.

Only four parties have commented on WCA's Petition: two in support (GTE and Liberty Cable Co., Inc.) and two in opposition (Liberty Media Corp. (Liberty Media) and Tele-Communications, Inc. (TCI)). These Reply Comments limit themselves to certain erroneous assertions made by Liberty Media and TCI.

II. As A Matter of Public Policy, Standing to Complain of Conduct Clearly Prohibited By Section 616 Must Not be Limited to VPVs Alone.

In their Oppositions, Liberty Media and TCI seek to restrict the filing of Section 616 complaints to VPVs, thereby insulating themselves (and other entrenched cable operators) from the legitimate grievances of competing MVPDs. As a clear matter of public policy, MVPDs should be afforded the same rights as VPVs to file complaints against cable operators that violate Section 616 if such MVPDs are injured by the conduct that Section 616 forbids. Simply stated, the restrictive nature of Section 76.1302(a) limits the disclosure of anti-competitive and discriminatory behavior on the part of cable operators. It therefore disserves obvious congressional intent in promoting competition and diversity in the multichannel video programming market. Legitimate complaints from MVPDs that allege behavior on the part of cable operators which have the effect of restricting the availability of video programming options to local cable subscribers must be allowed under the conditions of Section 616.

III. Section 628 Provides No Remedy For Injured MVPDs.

TCI avers that the existing program access provisions under Section 628 of the Act, 47 U.S.C. § 548, provide an adequate mechanism for MVPD complaints relative to programming contracts. (TCI Opp., at 6-8.) To the contrary, Section 628 does not reach all of the conduct prohibited by Section 616.

Section 76.1002 of the Commission's Rules, which implements Section 628's statutory provisions, prohibits the undue or improper influence in a cable operator's, affiliated satellite cable programming vendor's or a satellite broadcast programming vendor's sale of services, discrimination in prices, terms or conditions, and restricts the use of exclusive contracts and practices. In contrast, Section 76.1301 of the Commission's Rules, which implements Section 616's statutory requirements, governs carriage agreements and related practices between cable operators or MVPDs and VPVs and prohibits requiring a financial interest in a program service, requiring exclusivity of programming as a condition of carriage and conduct that restrains the ability of VPVs to compete. Contrary to TCI's averment, the conduct prohibited by Section 628 *vis-a-vis* Section 616, and their respective implementing rules, is not coextensive.

However, if the Commission should dismiss WCA's Petition, and finds that MVPDs have no standing under Section 616, the Commission must clarify that a MVPD may complain under Section 628 of the Act and Section 76.1003 of the its Rules for conduct otherwise proscribed by Section 616. To the extent that the cable industry contends that MVPDs are, indeed, protected by Section 628, that industry could not object to such a clarification. Moreover, to do otherwise could leave MVPDs with no

means to challenge Section 616 prohibited behavior. Clearly, this would limit the Commission's ability to thwart anti-competitive conduct on the part of cable operators, as was intended by Congressional enactment of Section 616.

IV. Identification of Mandatory "Carriage" as One Potential Remedy for Violation of Section 616 Does Not Limit Standing to File a Complaint.

Liberty Media supports its opposition to WCA's Petition by suggesting that Congress' identification of a specific remedy for violation of Section 616 somehow limits standing to VPVs. (Liberty Media Opp., at 2.) This is untrue. The precise language of the statute is that the Commission should provide for appropriate penalties and remedies "including" carriage. 47 U.S.C. § 536(a)(5).

While remedies such a mandatory carriage might make sense only for aggrieved VPVs, Section 76.1003(s)(1) (which implements 47 U.S.C. § 536(a)(5)) again speaks only in terms of "appropriate remedies" which the Commission may order. These remedies *may* "include" mandatory carriage. Such permissive language in no way limits the Commission's ability to fashion "appropriate penalties and remedies" with respect to injured MVPDs.

V. In Light of Section 616's Prohibited Conduct Having been Identified To Cause Injury to MVPDs, the Remedial Purpose of the Statute May Not Be Undermined By a Restrictive Rule Limiting Standing to Complain to VPVs.

As set forth in GTE's Comments (at 2-3), Congress has specifically identified MVPDs as parties injured by the conduct which Section 616 prohibits. By apparently limiting standing to VPVs, the Commission effectively "reads out" this explicit Congressional finding from the statute. Such an action is contrary to accepted rules of statutory construction.

It is axiomatic that Congress has inserted every part into a statute for a purpose. In enacting a statute, it is presumed that the entire statute is intended to be effective. See, e.g., Uniform Law Commissioner's Model Statutory Construction Act, 14 U.L.A. 532 (1980). If a statute is susceptible to two constructions, one which will give effect to the act and one which will defeat it, the former is preferred. E.g., *Anniston Manufacturing Co. v. Davis*, 301 U.S. 337 (1937). Indeed, a statute will not be given a construction by which its effectiveness is impaired, so long as a different construction is possible. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). This is all the more true for remedial statutes (such as Section 616) which are entitled to liberal construction. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939).

To limit standing under Section 616 to VPVs alone defeats the express remedial purpose of the statute. Section 616 clearly identifies MVPDs as parties injured by the conduct which it prohibits. To limit standing to VPVs requires ignoring this finding and counters the remedial intent of Congress. Indeed, it leaves parties specifically injured by the proscribed conduct without redress. Having identified MVPDs as injured by the proscribed conduct, Congress cannot reasonably be said to have left them without a remedy. Such a conclusion requires a tortured reading of the statute, at best.

VI. Conclusion.

For the reasons stated hereinabove, and those previously set forth in its Comments and in WCA's Petition, GTE respectfully urges the Commission to expeditiously amend Section 76.1302(a) of its Rules and afford standing to MVPDs to file complaints under Section 616 of the Act, as is consistent with Congressional intent.

Respectfully submitted,

GTE Service Corporation and its affiliated
domestic telephone operating companies

Ward W. Wueste, Jr., HQE03J43
John F. Raposa, HQE03J27
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(214) 718-6969

A handwritten signature in dark ink, appearing to read "Gail Polivy", is written over a horizontal line.

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5214

June 3, 1994

Their Attorneys

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply Comments on Petition for Partial Reconsideration" have been mailed by first class United States mail, postage prepaid, on the 3rd day of June, 1994 to all parties of record.



Ann D. Berkowitz